Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

NO.

IN THE MATTER OF HARRY C. BROWN, SR., PROBATE JUDGE FOR JASPER COUNTY, SOUTH CAROLINA,

Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

RUSSELL BROWN, Esq. *
41 Morris Street
Charleston, SC 29403
(803) 723-1658

FRED HENDERSON MOORE, Esq.
150 A St. Philip Street
Charleston, SC 19403
(803) 722-2100

Attorneys for Petitioner
Counsel of Record *

88 pp

QUESTIONS PRESENTED

1. Whether Due Process and Equal Protection of the law precludes a finding of unethical conduct where the conduct complained of is authorized by State Statute?

2. Whether without prior Notice Petitioner may be sanctioned for a purported act of mis-conduct or breach of ethics even though the conduct complained of is a vested right authorized by State Statute or a valid subsisting State Statute?

PARTIES TO THE PROCEEDING

Petitioner represented on this Petition is the elected and qualified Judge of Probate for Jasper County, a political subdivision of the State of South Carolina.

Petitioner's adversary is The Board of Commissioners on Judicial Standards (referred to hereinafter as Commission). Counsel for the Commission. are Charles Malony Condon, Esquire, Attorney General for South Carolina, and Nathan Kaminski, Jr., Esquire, Senior Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549, Phone: 803-265-6283.

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A. Whether due process and equal protection of the law precludes a finding of unethical conduct where the conduct where the conduct complained of is authorized by State Statute?

B. Whether without prior Notice Petitioner may be sanctioned for a purported act of misconduct on breach of ethics, even though the conduct

complained of is a vested right authorized by State Statute on a valid subsisting State Statute?

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The unpublisheed Order of the Supreme Court of South

Carolina is reproduced at pages 27 through 28 of the Appendix to this Petition and is cited hereinafter as "Final Order." The unpublished "Certification to the Supreme Court" of The Board of Commissioners on Judicial Standards is reproduced at pages 19- 21 of the Appendix to this Petition and is cited hereinafter as "Commission Certification."

JURISDICTION

The judgement of the Supreme Court of South Carolina was entered on September 11, 1996. This Court has jurisdiction under 28 U.S.C. 1257 (C). Jurisdiction of the Supreme Court of South Carolina was proper pursuant to Rule 502, Judicial Discipline and Standards Appellate Court Rules. Jurisdiction of The Board of Commissioners on Judicial Standards was proper pursuant to Rule 502, Judicial Discipline and Standards, of South Carolina Rules of Appellate Court Rules. And Jurisdiction of the Panel of Hearing Masters was proper pursuant ot Rule 502, Judicial Discipline and Standards, South Carolina Appellate Court Rules.

STATUTES AND RULES INVOLVED

THIS case involves S.C. Code Ann. Section 20-30.3; as amended; Rule 501, 5(c)(1), Code of Judicial Conduct, South Carolina Appellate Court Rules, Rules 502 and 503, Judicial Discipline and Standards, South Carolina Appellate Court Rules; and 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

THE PETITIONER, Harry C. Brown, Sr., is a citizen of the County of Jasper, and the State of South Carolina. He was the elected Probate Judge for Jasper County since November, 1986. As such, he was and is now a judicial officer.

Petitioner adversary is The Board of Commissioners on Judicial Standards (Commission). The Commission powers are prescribed in Rule 502, Judicial Discipline and Standards, of the South Carolina Appellate Court Rules. It is charged with the responsibility of conducting preliminary investigation of complaints of misconduct by judges. If misconduct is disclosed, the

Commission is further charged with the responsibility of filing a Complaint against the Judge who is the subject thereof. An Answer is required to be filed, a hearing is scheduled thereon before a panel styled Hearing Masters, who, after the hearing, file a Report with the Commission containing their findings and recommendations.

The legal representative for the Commission, referred to as the Examiner and or the Respondent are granted leave to file a Statement of Objections to the Report of the Hearing Masters. If a Statement of Objection is filed, an appearance is authorized before the Commission, who, thereafter will act upon the Report of the Hearing Masters through the filing of a Certification to the Supreme Court of South Carolina (Supreme Court) with its recommendations in regards to the manner of discipline to be administered.

ON OR ABOUT June 9, 1995, the Commission caused a Complaint (App 1) to be served upon the Petitioner. One of the alleged allegation of misconduct therein was that the Petitioner, contrary to a Jasper County, South Carolina Ordinance, failed to turn over such fees and honorariums to the County Treasurer, specifically, fees and honorariums received for performing marriage ceremonies. Other acts of misconduct were alleged in the Complaint. The Supreme Court in its Final Order (App 27) of September 11, 1996, found that the Respondent "committed Judicial misconduct by retaining fees and honorariums given him for performing marriage ceremonies. Specifically, it was held that his conduct violated Canon 5 (C) (1), of Rule 501 of the Code of Judicial Conduct, and imposed a private reprimand.

FURTHER, THE SUPREME COURT in its Final Order enjoined the Petitioner to "henceforth submit any payments received for the performance of marriage ceremonies as provided in the County Ordinance",and admonished Petitioner that his failure to do so would result in a more severe sanction than what was imposed on September 11, 1996.

IN 1953, THE GENERAL ASSEMBLY of South Carolina enacted Code Section 20-30.3, a special provision for Jasper County, which provided as follows:

> "The Judge of Probate of Jasper County, when requested, shall perform marriage ceremonies during official office hours. He shall charge and collect three Dollars for each marriage license issued by him, regardless of whether it is issued during office hours or not. He shall make no charge for issuing certified copies of marriage certificates. He shall make no charge for the performance of marriage ceremonies during office hours. He or someone acting in his behalf shall collect all fees and they shall, together with all other fees and commissions received by the probate judge, be turned over monthly to the treasurer of the County".

Section 20-30.3 became the subject of a series of amendments. The last two amendments occurring during the 1971 and 1974 session of the General Assembly of South Carolina. Section 20-30.3, as Amended in 1971, read as follows:

> The Judge of Probate for Jasper County, when requested, shall perform marriage ceremonies during official office hours. He shall charge and collect ten dollars for each marriage license issued by him, regardless of whether it is issued during office hours or not. He shall charge one dollar for issuing certified copies of marriage certificates. He shall make no charge for the performance of marriage ceremonies during office hours. He or someone

acting in his behalf shall collect such fees as they shall, together with all other fees and commission received by the probate judge, be turned over monthly to the treasurer of the county".

THE 1974 AMENDMENT of Section 20-30.3 read as follows:

> The Judge of Probate of Jasper County, when requested, may perform marriage ceremonies during official office hours. He shall charge and collect ten dollars for each marriage license issued by him, regardless of whether it is issued during office hours or not. He shall charge one dollar for issuing certified copies of marriage certificates. He or someone acting in his behalf shall collect all fees and they shall, together with all other fees and commissions received by the probate judge, be turned over monthly to the treasurer of the county".

Performing marriage ceremonies during office hours became a matter of discretion with Probate Judges and their making a charge for performing them during office hours was removed. There have been no modification or amendment to Section 20-30.3, since the 1974 amendment. Section 20-30.3 was never repealed. The restraint against making a charge for performing marriage ceremonies having been removed, the

implication is clear from the 1974 amendment that the Probate Judges for Jasper County were authorized to make and retain remunerations of any kind, including a charge for performing marriage ceremonies during office hours or thereafter.

PETITIONERS PREDECESSOR in office prior to November 1986, performed marriage ceremonies during and after office hours, and retained the remunerations received from the participants in the ceremonies.

ON DECEMBER 5, 1994, Jasper County Council, adopted the following ordinance:

> AN ORDINANCE TO ESTABLISH FOR JASPER COUNTY PROVISIONS FOR DISPOSITION OF FEES COLLECTED:
>
> SECTION I:
>
> ALL SUCH FUNDS GENERATED from fees collected and monies received by Jasper County Departments' employees and or elected officials shall be memorialized with appropriate accounting methods for the purposes of audits and all such funds shall be timely deposited with the Jasper County Treasurer's Office. "

THE "ADVISORY COMMITTEE ON STANDARDS

OF JUDICIAL CONDUCT", created pursuant to Rule 503, South Carolina Appellate Court Rules, issued its opinion #26-194 on October 10, 1994, which provided in part, as follows:

> III. A probate judge may not accept or obtain an honorarium for performing marriage ceremonies. Canon (5) (C) (1) of the Code of Judicial Conduct states that "a judge should refrain from financial and business dealings that tends to exploit his judicial position". A judge who accepts an honorarium for marital services performed is exploiting his judicial position for his own personal gain and thus violating Canon (5) (C) (1). Furthermore, the honorarium cannot be accepted as a gift under (4)(a)-(c) because it arises directly from his duties and powers conferred upon the judge. Therefore, a probate judge cannot accept an honorarium for performing marital services".

PETITIONER CHALLENGE the Constitutionality of Jasper County Ordinance and the Advisory Committee Opinion at all stages of the Disciplinary Proceedings. In his Answer, he allege that the application and enforcement of the provisions contained in the Jasper County Ordinance and the Advisory Committee opinion would deprive him of due process and equal protection of law as guaranteed by the Fourteenth Amendment

to the Constitution of the United States of America and of the State of South Carolina.

FOLLOWING THE HEARING before the Hearing Masters, Petitioner moved the Commission with a Notice of Motion and Motion (Appendix 16 thru 16F), among the other relief stated therein, to suspend the proceedings and for leave to be granted to him to seek Judicial relief form the enforcement of the Jasper County Ordinance and the Advisory Committee Opinion upon the ground that the compensation to be realized for the services rendered in performing marriage ceremonies was a vested property right and to restrict, limit or curtail hisright to be compensated for a service which he was statutorily authorized to be performed, would deprived him of a vested property right, and of property without due process and equal protection of the law as guaranteed by the applicable causes of the Constitution of the State of South Carolina and of the United States of America.

FOLLOWING THE FILING of the Certification of the

Record (App 19), Petitioner in a Motion to Dismiss of July 20, 1960 (App 16) moved the Supreme Court for the identical relief sought in his Notice of Motion and Motion to the Commission and upon the grounds that enforcement of the Jasper County Ordinance and the Advisory Commission Opinion restricted, limited, and or curtailed his right to accept and retain remuneration for a service authorized to be performed, and deprived him of a vested property right and property without due process and equal protection of the law as guaranteed by the Constitution of the State of South Carolina and of the United States of America.

AS STATED earlier, the Final Order of the Supreme Court of September 5, 1996, was entered, adopting therein the findings of the Hearing Masters that he committed judicial misconduct by retaining fees and honorariums given to him for performing marriage ceremonies, but without allowing a determination to be made that the collection and retention of fees and honorariums were not permitted by law, and yet went

on to hold that the alleged conduct was unethical. A sanction of a private reprimand was therein imposed upon him. Further, the Supreme Court to required the Respondent to remit any payments received for the performance of marriage ceremonies as required in the Jasper County Ordinance. He was admonished that his failure to do so would result in a more severe sanction than was imposed in the Final Order.

ON OCTOBER 10, 1996, PETITIONER filed with the Supreme Court his Notice of Intention to Appeal to the United States Supreme Court by way of a Writ of Certiorari from final judgement, ruling and decision of the Supreme Court, made and entered in this cause on September 11, 1996. Simultaneously, with the filing of his Notice of Intention to Appeal,, a Request for Stay was made directly to the Supreme Court of for its consideration. In an Order (App 35) of October 24, 1996, the Request for Stay was denied. In the October 24, 1996 Order, a requirement was placed upon the Petitioner to file an affidavit with the Clerk of the Supreme Court indicating

whether or not he was in compliance with the September 11, 1996 Final Order. Upon being served with the October 24, 1996 Order, Petitioner filed and served a Notice of Motion and Motion for the modification thereof, asking that following provisions thereof be vacated and set aside:

> FURTHER, RESPONDENT SHALL within ten (10) days of this Order, file an Affidavit indicating whether or not he has complied since September 11, 1996, with our Order requiring him to remit payments to the County. If the Affidavit indicate a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction".

THE MOTION FOR MODIFICATION of Order was denied on November 7, 1966.

THE CLERK OF THE SUPREME COURT, without a supporting Affidavit or verified petition, caused an Order containing a Rule to Show Cause (App 41) to be entered and serve on November 7, 1996, requiring the Petitioner to appear before the Supreme Court to Show Cause "why he should not be held in contempt.

PETITIONER as required, and appeared before the Commission on November 15, 1996, at which time the Order of the Commission (App 45) was published, adjudging that he stood privately reprimanded and admonished to comply with the terms of the Supreme Court Order of September 11, 1996.

PETITIONER after being served with the November 7, 1996 Order containing the Rule to Show Cause, served and filed a Motion to Dismiss the same. The Motion was orally denied on December 4, 1996, during the hearing on the Rule to Show Cause. The decision of the Supreme Court on the Rule to Show Cause was pending as of December 9, 1996.

REASONS FOR GRANTING THE WRIT

(Questions Number One and Two)

SECTION 28 USC 1257(a) provides that final judgement of the highest Court of a State inwhich a decision could be had, maybe reviewed by this Court by writ of certiorari where the validity of a statute of any State is drawn in question on the

grounds that it is repugnant to the Constitution of the United States, or where any title, right, privilege, or immunity is specifically set up or claim under the Constitution of the United States."DRAWN INTO QUESTION is the validity of Section 20-30.3 of the South Carolina Code of Laws for 1976, as amended, which authorized the Petitioner, as the Jasper County Judge of Probate to perform marriage ceremonies without any restrictions in regards to making a charge for performing them during office hours or at other times. The statute in question requires him to collect those fees enumerated therein and turn them over to the Treasurer for Jasper County. The statute, does not prohibit the making of a charge, and from its legislative history, by implication authorized the making of a charge. It is wholly absent in regards to the disposition he should or may make of any remuneration, whether being compensation, consideration, a gift, or an honorarium that he may receive for performing marriage ceremonies at any time, during office hours or thereafter.

PETITIONER asserted that pursuant to Section 20-30.3,

being authorized to receive income, he acquired the right to receive property, and on the receipt thereof, the remuneration would become his property. It has been repeatedly held by this Court that the "Rights of property which has been created by the common law cannot be taken away without due process; but the Law itself, as a rule of Conduct may be change at will, or even at the whim, of the legislature, unless prevented by constitutional limitations," Munn v. Illinois, 94 U.S.

113 (1897).

THIS COURT speaking further an Allgeyer v. Louisiana, 165 U.S. 578 (1897), held that:

> "The liberty mentioned in that amendment deems not only the right of the citizens to be free from the mere physical restraint of his person, as by incarceration, but the term is deem to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn a livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter in all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above

mentioned.

THE JUDGEMENT OF THE Supreme Court of was final within the meaning of the language contained in 28 U.S.C. 1257(a). It is clear that a conflict developed from the Supreme Court's Judgement with the Constitution of the United States. The conflict being whether or not the application of the proscription contained in the Jasper County Ordinance against the rights accorded to an claimed by the Petitioner through Section 20-30.3 of the South Carolina Code of Laws, for 1976, as amended, is repugnant to the Constitution of the United States and infringes upon, his rights, title and privilege to "due process and equal protection of the law" Thatare specially set up and are claimed by the Petitioner under the Constitution of the United States.

THE HOLDING of this Court in Fifke -vs- State of Kansas, 27 U.S. 380, 71 L.Ed 1108, 47 S.CT. 655, would be depositive of the issue that a substantial Federal question exist and warrants the granting of the Writ of Certiorari to the

Supreme Court of South Carolina. In that case, this Court held that:

> "A decision of a State Court applying and enforcing a State statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the Statute as so applied, and the judgement is, therefore, reviewable by writ of certiorari under Section 237 of the Judicial Code (Comp. St, Section 1214. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."
>
> "And this Court will review the findings of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidentiary support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon their Federal question, to analyze the facts.

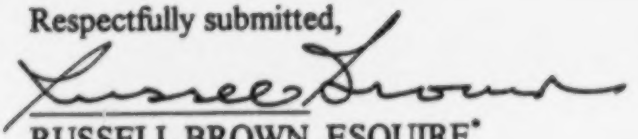
THE enforcement of the Jasper County Ordinance, by the Supreme Court of South Carolina, against for the right of the Respondent to receive and retain remuneration for performing marriage ceremonies as authorized by Section 20-30.3, would deprive him of a property right protected under the due process and

equal protection clause of Constitution of the United States of America. Such being the case, a Federal question is presented for review by this Honorable Court.

CONCLUSION

FOR ALL THE FOREGOING reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



RUSSELL BROWN, ESQUIRE*
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658

FRED HENDRSON MOORE, ESQUIRE
150-A ST. PHILLIP STREET
CHARLESTON, SC 29403
PHONE: 803-722-2100

ATTORNEYS FOR THE PETITIONER
COUNSEL OF RECORD (*)

Charleston, South Carolina

December 10, 1996.

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE MATTER OF)	BEFORE THE BOARD OF
)	COMMISSIONERS ON
HARRY C. BROWN, SR.)	JUDICIAL STANDARDS
PROBATE JUDGE FOR)	
JASPER COUNTY,)	
)	COMPLAINT
Respondent.)	
)	
)	

I.

The Respondent, Harry C. Brown, Sr., is a judge within the meaning of 2 (b) of the Rule on Judicial Discipline and Standards, Rule 502, S.C.A.R.C., and is a Judicial Officer of the State of South Carolina, viz., a Probate Judge in and for the County of Jasper, South Carolina.

II.

Upon information and belief, Respondent has committed

the following acts which constitute misconduct as defined in 1 of the Rule on Judicial Discipline and Standards:

A. The General Assembly in 1953 enacted a local law for Jasper County, S.C. Code Ann. 20-30.3 (1962), attached as Exhibit 1, which directed the Judge of Probate of Jasper County, when requested, to perform marriage ceremonies during official office hours. This local law, which was amended in 10971, (Act No. 237, 1971 S.C. Acts 269, attached as Exhibit 2) and again in 1974 (Act 1148, 1974 S.C. Acts 2632, attached as Exhibit 3 [but which amendment was contra to the provisions of S.C. Const. art. V, 1 and art. VIII, 7 ratified and effective in 1973]), further directed the Probate Judge to collect $10.00 for each marriage license issued by him as well as $1.00 for issuing certified copies of marriage certificates. The 1971 law, as amended, directed that the Probate Judge "shalll make no charge for the performance of marriage ceremonies during office hours." All versions of the local law directed the Probate Judge to turn over monthly to

Treasurer for marriage license fees remitted to the County from February, 1994, through September, 1994, are attached hereto as Exhibit 4.

E. Persons applying for marriage licenses are also told by the Respondent or his office staff that the Respondent can perform marriage ceremonies. The Respondent or his office staff schedule appointments (usually 24 hours after the issuance of the marriage license) with interested couples for the Respondent to perform the marriage ceremony, and further advise the individuals of the amount of the cash payment or marriage fee which the Respondent charges for performing the ceremony. During th Respondent's tenure as Judge of Probate, this ceremony fee or cash payment has increased from $20.00 to $50.00 per ceremony. The Respondent refers to these ceremony fees/cash payments as "honorariums." Many of these marriage ceremonies have been performed by the Respondent on county property on the grounds of the Jasper County Courthouse and/or during Respondent's regular business hours.

F. Despite the various provisions of the law cited in Paragrah A, in effect throughout the Respondent's tenure as Probate Judge, which precluded the Respondent from charging for marriage ceremonies performed during office hours and which required the Respondent to turn over to the Treasurer of the County all fees and commissions received by the Probate Judge, the Respondent has (1) collected fees/honorariums for performing marriage ceremonies during office hours on County property; and (2) has failed to turn over such fees/honorariums to the County Treasurer.

G. The decision of the South Carolina Supreme Court In the Matter of John Land Johnson, 302 S.C. 532, 397 S.E. 2d 522 (1990), placed the Respondent on notice that any fee collected by theRespondent in his capacity as Probate Judge, including those collected for performing marriage ceremonies, whether styled as "honorariums" or otherwise, were governed by S.C. Code Ann. 8-21-760 (1986), as amended, et. seq., and should be accounted for and paid into

the general fund of the county pursuant to Title 8, Chapter 21, Article 7 of the S.C. Code, whether or not specifically enumerated in Article 7. A copy of the Johnson decision is attached as Exhibit 5.

H. In August, 1994, a newspaper article was published in the Savannah Morning News, a copy of which is attached hereto as Exhibit 6, which raised questions about the propriety of the Respondent retaining $50.00 "personal honorariums" for performin marriage ceremonies during regular business hours and in the county courthouse.

I. In October, 1994, the Advisory Committee on Standards of Judicial Conduct issued Opinion No. 26-1994, a copy of which is attached as Exhibit 7, which stated, among other things, that a Probate Judge may collec a fee for performing marriage ceremonies if (1) the fee was authorized by the county governing body and (2) the fee collected was deposited in the general funds of the county. The Advisory Opinion further held specifically that "a Probate Judge may not

accept nor retain an honorarium for performing marriage ceremonies." A copy of this advisoy opinion was mailed by Court Administration to all Probate Judges, including the Respondent, on or about October 28, 1994.

J. On December 5, 1994, the Jasper County Council enactedc an ordinance which directed that all funds generated from fees collected and monies received by Jasper County departments'employees and/or elected officials should be accounted for and timely deposited with the Jasper County Treasurer's Office. A copy of this ordinance is attached hereto as Exhibit 8. On December 9, 1994, the County Administrator issued a memorandum to all county department heads and elected officials directing that they deposit into the County General Fund "all fees, honorariums, fees collected incident to [their] position and collected on county time or property", and holding each official "accountable" for such fees or collections as of the date of the ordinance. A copy of this memorandum is attached hereto as Exhibit 9.

K. Although the Respondent has been specifically advised about each of the matters related in Paragraph's G - J, with specific reference to a letter from the Board of Commissioners on Judicial Standards dated February 22, 1995, addressed to the Respondent, attached hereto as Exhibit 10, the Respondent has refused to acknowledge the impropriety of collecting and retaining fees/honorariums for performing marriage ceremonies. Further, Respondent

(1) continues to collect fees/honorariums for performing marriage ceremonies which are not authorized by the Jasper County council;

(2) continues to collect fees/honorariums for which the Respondent does not account for nor pay into the general fund of Jasper County; and

(3) continues to accept and retaing for his own personal use fees/honorariums for performing marriage ceremonies.

III.

As a result of the foregoing, Respondent has committed acts of misconduct under the Rule on Judicial Discipline and Standards, including but not limited to: a violation of Canon 1, by failing to maintain and observe high standards of conduct to preserve the independence and integrity of the Judiciary; a violation of Canon 2(A), by failing ot condict himself in a manner that promotes public confidence in the integrity and impartiality of the Judiciary; a violation of Canon 2 (B), by allowing his family, social or other relationships to influence his judicial conduct and judgement; a violation of Canon 3 (A) (3), by failing to be patient, dignified, and courteous to individuals with whom he deals in his official capacity; a violation of Canon 5 (C) (1), by engaging in financial and business dealings that

tend to interfere with the proper performance of his judicial duties and exploit the Respondent's judicial position; violation of Canon 6 (C), by failing to file public reports with the Office of the Clerk of the Supreme Court reporting the date, place and nature of any extra judicial activity for which the Respondent received compensation, including the name of the payor and the amount of compensation so received.

WHEREFORE, it is praye that the Board of Commissioners on Judicial Standards and the South Carolina Supreme Court inquire into these matters and take such action as they may deem appropriate.

C. Victor Pyle, Jr., Chairman
Board of Commissioners
On Judicial Standards

June 9, 1995.

STATE OF SOUTH CAROLINA	BEFORE THE BOARD OF COMMISSIONARS ON JUDICIAL STANDARDS
In the Matter of:	)
HARRY C. BROWN, SR., Probate Judge For Jasper County,	) AMENDED ANSWER
Respondent.	)

RESPONDENT, answering the Complaint herein, alleges:

ONE: UNLESS admitted, qualified and or explained, all allegations setforth in the Complaint are denied.

TWO: SO much of Paragraph I, which alleges, "The Respondent, Harry C. Brown, is a Judge", and is a judicial officer of the State of South Carolina, viz, a Probate Judge in and for the County of Jasper, South Carolina", are admitted. The other allegations setforth therein are denied.

THREE: PARAGRAPH II, denied.

FOUR: ANSWERING paragraph II-A of the Complaint,

Respondent alleges that the allegations setforth therein contain an incorrect re-statement of the statutory enactments specified therein, therefore, the allegations thereof are denied.

FIVE: FURTHER, answering Paragraph II A of the Complaint, Respondent alleges that during his tenure as the Probate Judge in and for the County of Jasper, State of South Carolina, the performance of his duties with respect to performing marriage ceremonies were prescribed pursuant to the provisions of Act No. 1148, 1974 S.C. Acts 2632, which, among oth things, gave him the right to elect, upon being requested, whether he should perform a marriage ceremony during official hours, and without any restrictions, limitations, or other requirements being imposed upon him in regards to making a charge for the performing of marriage ceremonies. Accordingly, Respondent alleges that in th absence of a proscription to make a charge for performing a marriage ceremony during office hours, her was never required to report an turn over any money received, whether through a charge

made, or otherwise, to the Treasurer for Jasper County. The basis for Probate Judges to report fees and commissions received, is pursuant to Article 7, Chapter 21, Title 8, not pursuant to Act No. 1148, 1974 S.C. Acts 2632, which, among other things, gave him the right to elect, upon being requested, whether he should perform a marriage ceremony during official office hours, and without any restrictions, limitations, or other requirements being imposed upon him in regardsto making a charge for the performing of marriage ceremonies. Accordingly, Respondent alleges that in the absence of a proscription to make a charge for performing a marriage ceremony during office hours, he was never required to report and turn over any money received, whether through a charge made, or otherwise, to the Treasurer for Jasper County. The basis for Probate Judges to report fees and commissions received, is pursuant to Article 7, Chapter 21, Title 8, not pursuant to Act No. 1148, 1974 S.C. Acts 2632.

SIX: PARAGRAPH II-B and II-C, denied.

SEVEN. PARAGRAPH II-D, denied.

EIGHT. PARAGRAPH II-E, Paragraph II-F and Paragraph II-G, denied.

NINE. RESPONDENT is without information sufficient to form a belief as to the allegations contained in Paragraph II-H of the Complaint. Therefore, they are denied.

TEN. ANSWERING Paragraph II-I of the Complaint, Respondent alleges that the allegations setforth therein are not applicable to him, he being the Probate Judge for Jasper County, whose duties with respect to performing marriage ceremonies are prescribed by a Legislative Enactment, to wit: Act No. 1148, 1974, S.C. Acts 2632, which authorized the Respondent, at his option, to perform marriage ceremonies during official office hours, and does not impose any proscription upon him not to make a charge for his services, and to report the amount received to the Treasurer for Jasper County. The enforcement of the provisions contained in the October 10, 1994 Advisory Opinion No. 26-1994, of the

Advisory Committee on Standards of Judicial Conduct, against the Respondent would deprive him of due process and equal protection of law as guarnteed by the Fourteenth Amendment to the Constitution of the United States of America, and of the State of South Carolina. The October 10, 1994, Advisory Opinion No. 26-1994 does not provide for retroactive application.

ELEVEN: ANSWERING Paragraph II-J of the Complaint, Respondent alleges that, pursuant to S.C. Code Ann. Section 4-9-30 (7) (1976), the Jasper County Council was without authority to enact an Ordinance abridging, curtailing or burdening the duties authorized to be performed by him, and did not impose any requirements upon him to report and turn over any money received either as a fee, or otherwise, received as a non-statutorily and directed collectible fund, fee, cost or charge for services performed that were required or assigned, to the Treasurer for Jasper County. The enforcement of the Jasper County Council Ordinance of December 5, 1994, by the

Board of Commissioners on Judicial Standards of any other agency of and within the State of South Carolina, would deprive the Respondent of equal protection and due process of law as guaranteed by the Constitution of the United States of America, and of the State of South Carolina. Further, Respondent alleges that he is a Commissioned Notary Public, as such, he is authorized to administer oaths. Therefore, he is authorized to perform marriages pursuant to the provisions of S.C. Code Ann. Section 20-1-20 (1976). The Ordinance does not provide for retroactive application.

TWELVE: PARAGRAPH II-K, denied.

THIRTEEN: PARAGRAPHS II-L, II-M, II-N, and II-O are denied in their entirety.

FOURTEEN: PARAGRAPH III, denied in its entirety.

WHEREFORE, Respondent, having fully answered the Complaint herein, prays that the same be dismissed with prejudice.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658
ATTORNEY FOR THE RESPONDENT

Charleston, South Carolina

_____,1995.

STATE OF SOUTH CAROLINA BEFORE THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS

IN THE MATTER OF:	)	
	)	
HARRY C. BROWN, SR.,	)	**NOTICE OF MOTION**
PROBATE JUDGE FOR	)	**AND**
JASPER COUNTY,	)	**MOTION**
	)	
Respondent.)		

TO: CHARLES MOLONY CONDON, ATTORNEY GENERAL, AND NATHAN KAMINSKI, JR., SENIOR ASSISTANT ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA:

PLEASE TAKE NOTICE that the Respondent, with his undersigned attorney will appear before the Board of

Commissioners on Judicial Standards, at 11:30 o'clock, a.m. on April 19, 1996, in the Conference Room of the South Carolina Court Administration, on the Second floor of the Calhoun Building, 1015 Sumter Street, Columbia, South Carolina and will move the Board of Commissioners on Judicial Standards for an Order remanding the foregoing matter to the Hearing Masters for a ruling on the Respondent's Motion to Dismiss (copy attached), or alternatively, to direct that the further processing of the within disciplinary proceedings be suspended, and for leave to be granted to the Respondent to commence an action in an appropriate judicial forum for a determination of the issue of whether the two (2) agencies identified in the Complaint herein, namely the "Advisory Committee on Standards of Judicial Conduct" and the "Jasper County Council" in "Opinion No. 26-1994" and "An Ordinance to Establish For Jasper County Provisions For Disposition of Fees Collected, Section 1, Adopted December 5, 1994", respectively, were without authority, pursuant to South

Carolina Code Ann., Section 4-9-30 (7) and Section 20-3-.3, to regulate policies and procedures for the performance of the duties and functions of the Respondent as the Probate Judge for Jasper County, South Carolina, who was elected to said office by the people (qualified voters) thereof.

GROUNDS FOR THE aforementioned Motion will be that Respondent was and continue to be statutorily authorized to administer marriage ceremonies incident to his office without any restrictions or limitations, as to time, place and the receipt of compensation of any description for said services. That the compensation to be realized for the services performed is a vested property right, and to restrict, limit or curtail Respondent's right to be compensated for a service, authorized to be performed and compensated for by others (S.C. Code Ann., Section 20-1-20), would deprive him of property right, and of property without the due process and equal protection of law, as guaranteed by the applicable clauses of the Constitution of the State of South Carolina and of the

United States of America. AND

THAT IN VIEW of the Constitutional prohibition, as aforesaid, The Board of Commissioners of Judicial Standards would without authority entertain a Complaint, subject the Respondent to the threat of discipline, and discipline the Respondent for the engaging in performance of activities that are statutorily authorized to be performed by the Probate Judge for Jasper County.

RUSSELL BROWN, ESQ.
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658
ATTORNEY FOR
RESPONDENT

Charleston, South Carolina

_____,1996.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN RE:	)	
	)	CERTIFICATION OF
THE	)	
HARRY C. BROWN, SR.	)	RECORD
Probate Judge for	)	
Jasper County,	)	
	)	
Respondent.	)	
	)	
	)	

The records of the Board of Commissioners on Judicial Standards pursuant to South Carolina Appellate Court Rule 52, Paragraph 20, are certified as follows:

1. Complaint
   Notice dated June 9, 1995, and
   Complaint dated June 9, 1995.

2. Answer of Defendant
   Answer dated July 5, 1995.

3. Amended Answer and Notice of Motion and Motion
   Dated September 16, 1995.

4. Examiner's Hearing Memorandum
   Dated September 22, 1995.

5. Transcript of Record

6. Transcript of hearing held before Masters on September 22, 1995.

7. Transcript of Record
   Transcript of conclusion of hearing heldbefore Hearing Masters on November 17, 1995.

8. Exhibits
   Examiner's Exhibits 1 through 13 (Notebook) Respondent's Exhibits 1 and 2.

9. Report of Hearing Masters
   Report dated March 1, 1996.

10. Respondent's Statement of Objection to the Report of the Hearing Masters.
    Dated April 5, 1996.

11. Return to the Respondent's Statement of Objections to the Report of the Hearing Masters.
    Dated April 15, 1996.

12. Notice of Motion and Motion, Motion and Motion and Motion Notice dated September 16, 1995 andMotion dated April 16, 1996
    (Notice same as submitted to Masters resubmitted to Board)

13. Report of the Board of Commissioners on Judicial Standards
    Report dated April 30, 1996.

Administrative Assistant
Judicial Standards

Commission

Date: May 2, 1996

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

JUDICIAL DISCIPLINE AND STANDARDS

IN THE MATTER OF:)
)
HARRY C. BROWN, SR.,)
PROBATE JUDGE FOR)
JASPER COUNTY,)
)
RESPONDENT.)
)

MOTION TO DISMISS, OR ALTERNATIVELY TO SUSPEND FURTHER ACTION IN THE WITHIN

DISCIPLINARY PROCEEDING AND GRANT LEAVE TO THE RESPONDENT TO OBTAIN A JUDICIAL DETERMINATION FROM AN APPROPRIATE JUDICIAL FORUM DECLARING THE AUTHORITY OF THE ADVISORY OF THE ADVISORY COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT AND THE JASPER COUNTY COUNCIL TO PRESCRIBE POLICES AND PROCEDURES FOR IN THE OPERATION OF HIS OFFICE AS THE ELECTED JUDGE OF PROBATE FOR JASPER COUNTY, AND FOR THE RELAXATION OF PARAGRAPH 33 (A) OF THE RULES OF JUDICIAL DISCIPLINE AND STANDARDS:

TO: **THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE SUPREME COURT OF SOUTH CAROLINA:**

COMES NOW THE RESPONDENT and moves this Honorable Court for an Order of Dismissal of the foregoing Proceeding, or alternatively for an Order directing the suspension of further action toward the final determination thereof and the relaxation of Paragraph 33 (a) of the Rules of Judicial Discipline and Standards, with leave being granted to the Respondent to

commence an action in an appropriate judicial forum for a determination of the issue of whether the two (2) agencies identified in the Complaint herein, namely the "Advisory Committee on Standards of Judicial Conduct" and the "Jasper County Council," in "Opinion No. 26-1994" and "An Ordinance To Establish For Jasper County Provisions for Disposition of Fees Collected, Section 1, adopted December 5, 1994," respectively were without authority, pursuant to S.C. Code Ann., Sections 4-9-10, 4-9-120 and 8-21-760, to regulate policies and procedures for the performance of marriage, ceremonies, a statutorily authorized function of the office of the Judge of Probate for Jasper County, South Carolina, an elected judicial official by the people of thereof.

GROUNDS FOR THE AFOREMENTIONE MOTION ARE:

ONE: THAT THE RESPONDENT, at all times mentioned in the Complaint was and continued to be statutorily authorized to performed marriage ceremonies incident to his office and or as an individual otherwise officially authorized to administer

oath in Jasper County and elsewhere within the State of South Carolina. Respondent was possessed of dual authorization, and without any restrictions or limitation, as to time, place and the receipt of remuneration in any form or typw being a fee (fixed or discretionary in amoung), gratuity, gift, honorarium, donations, or otherwise;

TWO: **THAT THE REMUNERATIONS** allegeg to have been realized by the Respondent for performing marriage ceremonies were part vested property rights to receive incomes for services rendered;

THREE: **THAT TO RESTRICT**, limit or curtail Respondent's right to accept and retain remunerations for a service, the performance of which is authorized to be performed by the Respondent, and by others, but without their right to accept and retain remunerations therefor being restricted, limited or curtailed, deprive him of a property right without due process and equal protection of the law, as guaranteed by the constitution of the State

of South Carolina and of the United States of America;

And,

FOUR: **BECAUSE OF THE** Constitutional proscriptions, the Board of Commissioners on Judicial Standards was without authority to initiate and maintain the foregoing Complaint and subject the Respondent to the threat of being Discipline for for engaging in the performance of activities that were statutorily authrized.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658
ATTORNEY FOR RESPONDENT

Charleston, South Carolina

July 20 ,1996.

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown, Respondent

ORDER

Respondent was found to have committed judicial misconduct by retaining fees or honorariums given him for performing marriage ceremonies. The Hearing Masters found this conduct violated Canon 5 (C) (1) of Rule 501, SCACR, the Code of Judicial Conduct and recommended a private reprimand. The Judicial Standards Commission concurred in the Masters' finding, but recommended respondent receive a public reprimand. We find misconduct, and impose a private reprimand.

Respondent appears to believe that his conduct is statutorily authorized, and therefore cannot be deemed unethical. Assuming but not deciding that the collection and retention of these fees is permitted by law, we none-the-less hold that such conduct is unethical. We point out, for example, that we have forbiddent probate judges from action as personal representatives except for family members, despite a statute specifically authorizing them to act as the personal representative in certain small estates. Compare D.C. Code Ann. 62-3-1202A (Supp. 1995) with Canon 5 (D), SCACR. We remind respondent that a judge must not only avoid impropriety, but must scrupulously avoid even the **appearance** of

impropriety. Respondent shalll henceforth remit any payment received for the performance of marriage ceremonies as provided in the County Ordinance. Failure to do so shall result in a more severe sanction than that we impose today.

IT IS HEREBY ORDERED that this matter be remanded to the Judicial Standards Commission for the purposes of administering a private reprimand and of admonishing respondent of the need for him to immediately and fully comply with the terms of this Order. Respondent shall appear at the time and place designated for such purposes.

_____ C.J.

_____ A.J.

_____ A.J

_____ A.J.

Burnett, A.J., not participating

September 11, 1996

IN THE UNITED STATES SUPREME COURT

THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS,	)	
Appellee,	)	
-versus	)	
	)	**NOTICE OF APPEAL**
HARRY C. BROWN, SR., JUDGE OF PROBATE FOR JASPER COUNTY,	)	
	)	**NO:_____**
Appellant.	)	

TO: CHARLES M. CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, AND THE APPELLEE:

THE APPELLANT, Harry C. Brown, Sr. through his undersigned counsel hereby gives Notice of Intention to appeal and does hereby appeal to the United States Supreme Court by way of **Certiorari** from the judgment, rulings and decision of the South Carolina Supreme Court made and entered in the foregoing matter

on September 11, 1996.

Dated this 10th day of October, 1996.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT

STATE OF SOUTH CAROLINA

THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS, Appellee, -versus- **HARRY C. BROWN, SR., JUDGE OF PROBATE FOR JASPER COUNTY,** Appellant.	**REQUEST FOR STAY**

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICE OF THE SUPREME COURT OF SOUTH CAROLINA:

THE APPELLANT Harry C. Brown, Sr., has heretofore given Notice of Appeal by way of Certiorari to the United States Supreme Court and which Notice wa submitted for filing on October 10, 1996.

THEREFORE, in accordance with **RULE 225** of

the South Carolina Supreme Court's Rule of Appellate Practice, the Appellant moves this Honorable Court for a Stay of its **Order** of judgement dated September 11, 1996, for a period of Ninety (90) days to enable Appellant to perfect his Petition of Certiorari to the United States Supreme Court and then thereafter until such time as the United States Supreme Court has disposed of the said Petition for Certiorari, otherwise Appellant's constitutionally protected right to appeal and pursuant of this matter would be fruitless and academic.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658

ATTORNEY FOR APPELLANT

Charleston, South Carolina

October 10 1996.

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown, Respondent.

ORDER

Respondent's request for a stay of our order dated September 11, 1996, is denied. Further, respondent shall, within ten days of the date of this order, file an affidavit indicating whether or not hes has complied since September 11, 1996, with our order requiring him to remit payments to the County. If the affidavit indicates a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction.

IT IS SO ORDERED.

_____ A.J.

_____ A.J

_____ A.J.

_____ A.J.

Columbia, South Carolina

October 24, 1996

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

JUDICIAL DISCIPLINE AND STANDARDS

IN RE:	)
	)
IN THE MATTER OF HARRY C. BROWN, SR.,	)
	)
PROBATE JUDGE FOR JASPER COUNTY,	)
	)
RESPONDENT,	)
	)
	)

NOTICE OF MOTION AND MOTION
FOR MODIFICATION OF ORDER

TO: THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

COMES NOW THE RESPONDENT and moves the Court for an Order modifying the Order that was entered in the

above matter on October 24, 1996 through the vacating and setting aside of so much thereof which provides as follows:

> "FURTHER, respondent shall, within ten (10) days of this order, file an affidavit indicating whether or not he has complied since September 11, 1996, with our order requiring him to remit payments to the County. If the affidavit indicates a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction."

GROUNDS for the aforementioned motion will be that the quoted provisions of the referenced Order directs the filing of an affidavit from which the Court or the Clerk may interpret and find that it disclose sufficient reason for the issuance of a Rule To Show Cause to the Respondent, and thereafter subject him to appear and be exposed to the Court's judgement that he is in the criminal contempt thereof and be further subjected to punishment up to and including imprisonment in the discretion of the Court.

The demand for the production and filing of the aforementioned affidavit violates the Respondent's constitutional privilege against self incrimination as guaranteed by the Fifth Amendment to the United States Constitute and or Article I, Section12, of the Constitution of the State of South Carolina.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658

ATTORNEY FOR RESPONDENT

Charleston, South Carolina

November 4, 1996.

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, SC 29211
(803) 734-1080

November 7, 1996

Russell Brown, Esquire
41 Morris St.
Charleston, SC 29403

Re: BROWN, HARRY C. SR. - In the matterof

Dear Mr. Brown:

The following Order has been endorsed on your Motion for Modification of Order in the above entitled matter:

"Motion for Modification of Order is denied.

s/Ernest A. Finney, Jr. C.J.
For the Court

November 07, 1996"

Your attention is directed to the Rule to Show Cause which is scheduled for hearing on November 20, 1996, at 2:30 P.M., with reference to the above matter.

Very truly yours,

CLERK

CNB, Jr./bfs

cc: The Honorable Harry C. Brown, Sr.
The Honorable Nathan Kaminski, Jr.
Ms. Carol Fulton
The Honorable Charles Molony Condon

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown, Sr., Respondent.

ORDER

On September 11, 1996, the Court issued a private reprimand to respondent. On October 24, 1996, the Court issued an order which, among other things, required respondent to file an affidavit within ten (10) days. Failure to file an affidavit would result in the issuance of a Rule to Show Cause by the Clerk of Court. Id. The ten day period expired on November 4, 1996, without submission of the affidavit.

IT IS ORDERED that respondent shall appear before the Court in the Supreme Court Courtroom, in Columbia, South Carolina, at 2:30 P.M., or as soon thereafter as the matter can be heard, on November 20, 1996, to show cause why he should not be

held in contempt.

Copies of this order, certified by the Clerk of this Court, shall be served upon the respondent or his counsel, personally or by certified-return receipt mail.

_____

Columbia, South Carolina

November 7, 1996

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Personally appeared before me Clyde N. Davis, Jr., Clerk of the South Carolina Supreme Court, who after being duly sworn, deposes and says: That on information and belief, the order of the Court dated September 11, 1996, issuing the private reprimand and setting forth certain stipulations of the Court was sent to Harry C. Brown, Sr., and Russell Brown by certified mail-return receipt requested and was received by Harry C. Brown, Sr., and Russell Brown, as evidenced by return receipts received in the Office of the Clerk.

On information and belief, an Order of the Court dated October 24, 1996, was sent to Mr. Russell Brown and Mr. Harry C. Brown, Sr., advising that Mr. Harry C. Brown, Sr., must furnish this Court an affidavit that he had compiled fully with this Court's Order of September 11, 1996, remitting payments to the county, by certified mail-returned receipt requested and was received by Mr. Russell Brown and Mr. Harry C. Brown, Sr., as evidenced by return receipts received in the Office of the Clerk.

Mr. Harry C. Brown, Sr., has not complied with the Court's orders of September 11, 1996, and October 24, 1996.

_____

CLERK

Sworn to and subscribed before

me this 12th day of November, 1996.

NOTARY PUBLIC OF SOUTH CAROLINA

My Commission Expires: April 8, 2004

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS

IN THE MATTER OF:	)	
	)	**ORDER OF**
HARRY C. BROWN, SR.	)	**BOARD OF**
JASPER COUNTY	)	**COMMISSIONERS**
JUDGE OF PROBATE	)	
	)	
RESPONDENT.	)	
	)	
	)	

THIS MATTER CAME BEFORE THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS PURSUANT TO SOUTH CAROLINA APPELLATE COURT RULE 502, RULE ON JUDICIAL DISCIPLINE AND STANDARDS.

THE RESPONDENT WAS SERVED WITH A FORMAL COMPLAINT DATED JUNE 9, 1995, ALLEGING CERTAIN ACTS OF MISCONDUCT UNDER THE RULE ON

JUDICIAL DISCIPLINE AND STANDARDS AND THE CODE OF JUDICIAL CONDUCT.

THE MATTER WAS HEARD BEFORE A PANEL OF HEARING MASTERS SEPTEMBER 22, 1995, AND NOVEMBER 17, 1995, WHO FOUND RESPONDENT GUILTY OF MISCONDUCT AND RECOMMENDED A PRIVATE REPRIMAND.

AFTER HEARING ORAL ARGUMENTS, THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS AN MAY 2, 1996, RECOMMENDED TO THE SUPREME COURT OF SOUTH CAROLINA THAT A SANCTION OF PUBLIC REPRIMAND BE ISSUED.

SUBSEQUENT TO A HEARING ON JULY 24, 1996, THE SUPREME COURT, BY ORDER DATED SEPTEMBER 11, 1996, FOUND THE RESPONDENT GUILTY OF JUDICIAL MISCONDUCT AND IMPOSED A SANCTION OF PRIVATE REPRIMAND. THE COURT FURTHER ORDERED THAT RESPONDENT SHALL HENCEFORTH

REMIT ANY PAYMENT RECEIVED FOR THE PERFORMANCE OF MARRIAGE CEREMONIES AS PROVIDED IN THE COUNTY ORDINANCE. THE COURT REMANDED THE MATTER TO THE BOARD AND ORDERED THAT A PRIVATE REPRIMAND BE ADMINISTERED BY THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS AND THAT RESPONDENT BE ADMONISHED OF THE NEED FOR HIM TO IMMEDIATELY AND FULLY COMPLY WITH THE TERMS OF THE SUPREME COURT ORDER.

ACCORDINGLY, THE RESPONDENT, HARRY C. BROWN, HEREBY STANDS PRIVATELY REPRIMANDED AND ADMONISHED TO COMPLY WITH THE TERMS OF THE SUPREME COURT ORDER.

THE BOARD OF COMMISSIONERS ON
JUDICIAL STANDARDS

_____,CHAIRMAN

_____, VICE CHAIRMAN

_____, MEMBER

_____, MEMBER

_____, MEMBER

_____, MEMBER

_____, MEMBER

_____, MEMBER

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

JUDICIAL DISCIPLINE AND STANDARDS

IN THE MATTER OF:	)
HARRY C. BROWN, SR.,	)
Probate Judge for	)
Jasper County,	)
	)
Respondent.	)
	)

MOTION TO DISMISS:

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

COMES NOW THE RESPONDENT, appearing specifically and move the Court to dismiss the Order and Rule to Show Cause of the Clerk of this Court and the Affidavit issued thereafter, and respectively shows unto this Honorable Court as follows:

STATEMENT OF THE PROCEEDINGS

The above is a disciplinary proceeding commenced and maintained to final judgement pursuant to the provisions of the Code of Judicial Conduct. The Order of this Court announcing its Final Judgement was entered on September 11, 1996. Misconduct was found to have been committed by the Respondent through his retention of "fees or honorariums given him" for performing marriage ceremonies. Sanction of a private reprimand was imposed.

Among other things, the Order provided that:

> "Respondent shall henceforth remit any payment received for the performance of marriage ceremonies as provided in the County Ordinance. Failure to do so shall result in a more severe sanction that we impose today."

The Jasper County Ordinance referred to, and titled "An Ordinance to Establish For Jasper County Provisions For Disposition Of Fees Collected," provides:

> "All such funds

generated from fees collected and monies received by Jasper County Departments' employees and/or elected officials, shall be memorialized with appropriate accounting methods for the purpose of audit and all such funds shall be timely deposited with the Jasper County Treasurer's Office."

NOTICE OF APPEAL by way of Certiorari to United States Supreme Court from the Judgements, rulings and decision of this Court, made and entered in the foregoing matter on September 11, 1996, were served and filed by mailing on October 10, 1996. Simultaneously, with the service and filing by mailing of the Notice of Appeal, Respondent served and filed by mailing his "**REQUEST FOR STAY**" and moved the Court for a Stay of the Order of Judgement dated September 11, 1996, for a period of Ninety (90) days to enable the Respondent to perfect his Petition for Certiorari to the United States Supreme Court and then thereafter until such time as the United States Supreme Court has disposed of the said Petition for Certiorari.

Respondent's Motion for a Stay of the Order of Judgement was denied in the Order of this Court on October 24, 1996. The Order further provided that:

> "Further, Respondent shall, within ten (10) days of the this Order, file and affidavit indicating whether or not he has complied since September 11, 1996, with our order requiring him to remit payments to the County. If the affidavit indicates a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction."

Upon being served with a copy of the October 24, 1996 order, Respondent served and filed by mailing his Notice of Motion and Motion for Modification of Order with his supporting memorandum, through the vacating and setting aside of the above quoted provisions thereof. Respondent asserts that the quoted provisions of the October 24, 1996 order violated his constitutional privilege against self incrimination as guaranteed by applicable provisions of the

Constitution of the United States of State of South Carolina.

The Motion for the Modification of the Order of October 24, 1994 was denied on November 7, 1996.

An Order containing a Rule to Show Cause was entered on November 7, 1996, it was directed to the Respondent, requiring him to appear before this Court, at the time and of the date specified therein, and show cause why he should not be held in contempt. It was recited therein that:

> "On October 24, 1996, the Court issued an order which, among other things, required Respondent to file an affidavit within ten (10) days. Failure to file the affidavit would result in the issuance of a Rule to Show Cause by the Clerk of Court. Id. The ten (10) day period expired on November 4, 1996, within submission of the affidavit."

Thereafter an affidavit of the Clerk of this Court was entered on November 12, 1996, reciting therein among other things, the requirement that the Respondent "furnish this Court with an affidavit that he had complied fully with this Court's

Order of September 11, 1996, remitting payments to the County," and that "Mr. Harry C. Brown, Sr., has not complied with the Court's orders of September 11, 1996, and October 24, 1996.

There was no affidavit as a basis for the issuance of the Rule to Show Cause. Respondent hereby objects to its validity. In so doing he relies upon the precedent recited in State v Nathan, 49 S.C. 199, 27 S.E. 52 (1896) and State v Blackwell, 10 S.C. 38. He moves this Court to dismiss the Rule to Show Cause upon the ground that the matters charged therein were not stated under oath. As issued, the Court did not acquire subject matter jurisdiction to hear and dispose of the same.

As a further ground for dismissal, Respondent asserts that the requirements imposed upon him on by October 24, 1996 Order of this Court is coercive and deprives him of his constitutionally guaranteed privilege against self incrimination. He therefore moves the Court to Dismiss the Order of November 7, 1996, containing the Rule to Show Cause as to

why he should not be held in contempt, and punished. The Order tends to subject the Respondent to compulsory self incrimination. Immunity from any adverse action being taken against the Respondent from his filing the affidavit has not been shown or suggested, and certainty is not available to him under existing case and or statutory law, or by an order of this or any other Court of competent jurisdiction.

ARGUMENT

IN THE ABSENCE OF IMMUNITY, CAN THIS COURT COMPEL THE RESPONDENT TO TESTIFY, BY WAY OF AN AFFIDAVIT, OVER A CLAIM OF THE PRIVILEGE AGAINST SELF INCRIMINATION?

Final judgement having been entered in the above matter, the enforcement thereof is now at issue. The enforcement device being utilized is the Court contempt powers. Punitive, not remedial results are being sought. The object of the contempt sanction is criminal in nature. The September 11, 1996 order contained a reservation to the Court

to impose a greater sanction. The sanction could be increased up to and including imprisonment. The distinction between punitive (criminal) and remedial contempt appears in State v Magazine._____S.C._____,393 S.E. 2nd 385(1990), as follows:

> "I determining the nature of a contempt sanction, the focus is whether the punishment is remedial, for the benefit of the complainant, or punitive, to vindicate the authority of the Court....If the sanction is imprisonment, it is punitive when the sentence is limited to imprisonment for a definite period rather than conditioned on compliance with the Court's order....If the sanction is a fine, it is punitive, it is punitive if paid to the Court, unless the contempt or can purge himself by compliance with Th Court's order, and remedial if paid to the Complainant....The critical inquiry is whether the contempt or can avoid a sanction or purge himself of it by complying with the terms of the original order."

Several relevant principles of law should be noted and

considered in determining the legitimacy of the Respondents claim for relief from the orders referred above. They are listed numerically:

> (1). Would the Federal Fifth Amendment exception from compulsory self incrimination extend to and protect the Respondent in Th within State judicial proceeding? Yes. "The Fourteenth Amendment secures against State invasion of the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he/she chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, "..."The Fifth Amendment privilege against the self-incrimination implemented the Fourth Amendment in such cases, and the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States." Malloy v Hogan, 378 U.S.1, 84 S. CT. 1480 (1960).
>
> (2). Does the Federal Fifth Amendment exception from

compulsory self-incrimination extend to and protect the Respondent, he being a party, instead of a witness, in the within State judicial proceeding? Yes, in Counselmen v Hitchcock, Marshall, 142 U.S. 547,_____S.CT._____, (1892) the U.S. Supreme Court held "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supporting the privilege by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all of the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provisions, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of Emery's Case, in Massachusetts, then to that of People v Kelly, in New York;

and we consider that the ruling of this Court in Boyd v U.S., supra, support the view we take. Section 860, more, affords no protection against that use of compelled testimony which consist in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

(3). Would the Federal Fifth Amendment exception from compulsory self-incrimination extend to and protect the Respondent in the within State disciplinary proceeding? An affirmative response is required. We quote from 96 C.J.S. Witnesses. Sec. 441(c), the following:

"A disciplinary proceeding for the revocation of a professional or business license is not a criminal proceeding such as entitles defendant therein to refuse to testify. Hence a disbarment or other disciplinary proceeding against an attorney is not such a criminal prosecution as entitles defendant to decline to testify. However, he may invoke the constitutional privilege against

self-incrimination and decline to answer questions tending to incriminate him;"

(4). Would the Federal Fifth Amendment exception against compulsory self-incrimination extend to and protect the Respondent in the herein criminal contempt phase of the foregoing disciplinary proceeding? It does not, based on the following quotation from 96 C.J.S. Witnesses, Sec. 441 (d). "The constitutional guaranty that a person shall not be compelled to be a witness against himself in a criminal case applies in favor of a person charged with a criminal contempt, but not where the contempt charge is a civil contempt."

The following precedent taken from Kistegar v United Stats, 404 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972) should be dispositive of Respondents Motion to Dismiss:

"The power of the government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence. The power with respect to courts was established by statute in England as early as 1562, and Lord Bacon observed in 1612 that all subjects owed the King their "knowledge and

our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege.

II

THERE BEING NO AFFIDAVIT UPON WHICH THE RULE TO SHOW WAS ISSUED, DID THE COURT ACQUIRE THE SUBJECT MATTER JURISDICTION?

discovery." While it is not clear when grand juries first resorted to compulsory process to secure the attendance and testimony of witnesses, the general common-law principle that "the public has a right to every man's evidence" was considered an "indubitable certainty" that "cannot be denied" by 1742. The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts. Mr. Justice White noted the importance of this essential power of government in his concurring opinion in Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94, 84 S.Ct. 1594, 1611, 12 L.Ed.2d 678 (1964):

> "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. Blair v. United

States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979. Such testimony constitutes one of the Government's primary sources of information."

[1,2]

But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marked an important advance in the development of

DISCUSSION

The Order in which the Rule to Show Cause was issued, was not on oath. The absence thereof was not waived by the Respondent. The holding in State v Nathans, supra, is dispositive of this issue. There the Court held:

> "In 4 Encl. PL & Prac. 779, it is broadly and correctly stated that "the universal method by which contempt proceedings are begun is by affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the Court's immediate presence, and affidavit is essential." In State v Blackwell, 10 S.C. 38, this Court held that it is a fatal objection to a rule to show cause in contempt proceedings that is made without affidavit, the Court saying: "all parties charged, otherwise than by the oath of the grand jury, with offenses other than contempt committed in the presence of the Court, are entitled to have the matters charged stated under

> oath; the penalty for false swearing being regarded as a safeguard to the liberties of the citizens."

The alleged act of disobedience did not occur within the presence of the Court, and neither did the Respondent at anytime waive the error in the issuance of the Rule to Show Cause. Subject Matter jurisdiction never vested in and with this Court.

CONCLUSION

For the foregoing reasons, Respondent prays that the Rule to Show Cause should be

Dismissed.

RUSSELL BROWN, ESQUIRE

41

Morris Street

Charleston, SC 29403

Phone:

803-723-1658

ATTORNEY FOR RESPONDENT

Supreme Court, U.S.
FILED
JAN 14 1997
CLERK

No. 96-993

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HARRY C. BROWN, SR.,
Probate Judge for Jasper County
South Carolina,

Petitioner,

v.

BOARD OF COMMISSIONERS
ON JUDICIAL STANDARDS
of the Supreme Court of South Carolina,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES MOLONY CONDON
Attorney General for the
State of South Carolina

NATHAN KAMINSKI, JR.
Counsel of Record
Senior Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3708

QUESTIONS PRESENTED

Whether an Order of the South Carolina Supreme Court disciplining a State Court Judge for misconduct, and directing the Judge to remit to county government fees received for the performance of marriage ceremonies, raises an important question of federal law under the equal protection or due process clauses of the federal constitution.

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No. 96-993

In the

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October Term, 1996

HARRY C. BROWN, SR.,
Probate Judge for Jasper County
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Petitioner,

v.

BOARD OF COMMISSIONERS
ON JUDICIAL STANDARDS
of the Supreme Court of South Carolina,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Board of Commissioners on Judicial Standards of the Supreme Court of South Carolina respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina dated December 10, 1996 filed by Petitioner Harry C. Brown, Probate Judge for Jasper County, South Carolina.

COUNTERSTATEMENT OF THE CASE

A. *Legal Basis for the State Disciplinary Proceedings*

Petitioner is a judge of the probate court for the State of South Carolina and is elected by the qualified electors of Jasper County for the term of four years. S.C. Code Ann. §14-23-30 (1976). Petitioner is a "judge" pursuant to the express provisions of the Rule on Judicial Discipline and Standards, Rule 502, Section 2(b), South Carolina Appellate Court Rules (SCACR). As such, he is part of the Unified State Judicial System over which the S.C. Supreme Court (S.C. Sup. Ct.) exercises jurisdiction pursuant to S.C. Constitution, Article V, Section 1, and the S.C. Sup. Ct.'s inherent common law powers to protect and preserve the judicial system. Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991); Parrish v. Gilstrap, 280 S.C. 184, 312 S.E.2d 4 (1984); State, ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1975). As a judge subject to the Code of Judicial Conduct, Petitioner's activities, both judicial and extra-judicial, are subject to scrutiny and regulation by the S.C. Sup. Ct., both sua sponte and through the Board of Commissioners on Judicial Standards (Commission) where the Judge's activities may reflect adversely on the integrity, independence, and impartiality of the State judiciary.

B. *The Code of Judicial Conduct*

The Code of Judicial Conduct is found at Rule 501, SCACR. Canon 2 states that "[A] Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities". Canon 5 generally requires a

judge to regulate his extra-judicial activities to minimize the risk of conflict with judicial duties. Canon 5(C)(1) specifically sets forth the proposition that "a judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves." Canon 6 requires a judge to regularly file reports of compensation received for both quasi-judicial and extra-judicial activities, and precludes a judge from receiving any compensation for extra-judicial activities that "give the appearance of impropriety."

C. *The Factual Background*

In this case, the allegations of misconduct revolve around the facts that the Petitioner, as Jasper County Probate Judge, performs marriage ceremonies during official office hours, as well as on weekends, in the county court house. Jasper County is a border county between Georgia and South Carolina. Restrictions attendant to the issuance of a marriage license in South Carolina are less restrictive than those in border states such as Georgia. (Record below, Tr., vol. 1, p. 54, ll. 11-18; Exh. 7, Article from the Savannah Morning News dated August 8, 1994, entitled "Questions About Marriage Fees Policy Kindled, Probate Judge Keeps Honorariums"). Each year, hundreds of out-of-state couples routinely come to the office of the Judge of Probate in Jasper County to obtain marriage licenses and subsequently to have a marriage ceremony performed, often immediately after the 24 hour statutorily mandated "wait" period which follows the license application. S.C.

Code Ann. § 20-1-230 (1976). The number of marriage licenses routinely issued in Jasper County approach or exceed 1200 per year.[1]

Any persons applying for a marriage license in Jasper County pays the Petitioner a license fee of $10.00 in accordance with the provisions of local law, S.C. Code Ann. § 20-30.3 (1962) (Record below, Complaint Ex.'s 1 & 2). The Petitioner collects the $10.00 license fee and remits this monthly to the County Treasurer (Record below, Tr., vol. 1, p. 46, ll. 16-22).

But Petitioner, like a notary public, also possesses the authority to perform marriages because he is authorized to administer oaths. S.C. Code Ann. §§ 14-23-300 (1976) and 20-1-20 (1985). Because the marriage license applications funnel through the Probate Judge's office, Petitioner performs hundreds of marriage ceremonies each year. The couples obtain an appointment with Petitioner for the marriage ceremony. (Record below, Tr., vol. 2, pp. 50-51). Petitioner usually collects a

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[1] The testimony reflects that in 1991, out of a total of 1,114 marriages performed in Jasper County, 941 were for non-resident couples. In 1992, 1,138 marriage ceremonies were performed in Jasper County, of which 931 were for non-residents. In 1993, 1,152 marriages were performed in that county, of which 961 involved non-resident couples. In 1993, Respondent performed 1,017 of the Jasper County marriage ceremonies, or 88% of the total. In 1994, 1,210 marriages were performed in the county, of which 1,015 were for non-residents. In 1994, Respondent performed 980 of these marriages, or 81% of that annual total. Finally, in 1995, through the month of June, 482 ceremonies were conducted, of which 421 were for non-residents. During that 6 month period, Respondent performed 352 of the Jasper County marriages, or 73% of the total (Tr., vol 1, pp. 40-42).

marriage ceremony "fee" when he conducts a wedding, which Petitioner refers to as a "gift/honorarium" (Record below, Tr., vol. 1, p 47, ll. 14-20). This cash payment or fee is not set by a general or local law or by ordinance, and the amount charged for performing a marriage ceremony may depend upon the time and/or place of the ceremony (Record below, Tr., vol. 1, pp. 46-47).

The Petitioner states that each honorarium varies in amount up to $50.00 and the marriage ceremonies are performed at different times (including week-ends) and in different locations, but some marriage ceremonies are performed in the Probate Judge's office during regular office hours. (Record below, Tr., vol. 1, p. 47). Petitioner does not account for or remit any of the "honoraria" to Jasper County and has never reported any of this compensation on his Rule 501, SCACR, Disclosure Statements or on his Statement of Economic Interests forms filed with the South Carolina State Ethics Commission.

Petitioner has continued this practice of accepting and retaining for his personal use all fees/"honorariums" which he receives for performing marriage ceremonies despite the S.C. Sup. Ct.'s admonition in Matter of Johnson, 302 S.C. 532, 397 S.E.2d 522 (1990), that any fee collected by a probate judge, even if not specifically enumerated by the General Assembly under S.C. Code Ann., Title 8, Chapter 21, Article 7, (dealing with probate fees and costs), belonged to the county and must be remitted by the probate judge to the county treasurer for deposit into the general fund of the county. In Johnson, the probate judge was publicly reprimanded for retaining for his personal use fees received from the Department of Mental Health ("DMH") for hearings

he conducted for DMH patients.[2] There was no fee established by ordinance or statute for conducting those hearings. In the same fashion, the marriage ceremony fee collected by Petitioner is not set by either Jasper County ordinance or by state statute.

D. *The Disciplinary Proceedings*

A formal disciplinary proceeding before the Commission was initiated by a Notice and Complaint dated June 9, 1995, alleging misconduct by the Petitioner in accepting and retaining fees/honorariums for performing marriage ceremonies. (Pet. App. 1-9). An Answer dated July 5, 1995, and an Amended Answer dated September 16, 1995, were filed on behalf of the Petitioner denying misconduct. (Id. at 10-15).

A hearing was held before a three judge panel of Hearing Masters on September 22, 1995. After some testimony was taken, the hearing was continued, and subsequently completed on November 17, 1995.

The Hearing Masters issued a Report dated March 1, 1996, finding that certain allegations of misconduct alleged in the complaint had been proven by clear and convincing evidence, and that the Petitioner had violated Canon 5(C)(1), and Canon 6(C) of the Code of Judicial Conduct, Rule 501,

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[2] The Johnson case is in keeping with the principal enunciated in Spartanburg County v. Pace, 204 S.C. 322, 29 S.E.2d 333 (1944), where the South Carolina Supreme Court, even prior to the passage of the Uniform Judicial Act, was of the view that in those counties where probate judges were placed entirely on a salary (which is the case presently in every county), the salary was "in full", and additional compensation from whatever source was prohibited.

SCACR. The panel recommended a private reprimand.

Pursuant to the Rule on Judicial Discipline and Standards, Rule 502, SCACR, the matter came before the full Commission. The Petitioner, on April 5, 1996, filed Objections to the Report of the Hearing Masters, to which the Examiner filed a Return on April 15, 1996. The Petitioner also filed with the Commission a motion to dismiss and/or to "remand" the matter to the Masters, or, alternatively, to "suspend" the proceedings.

After hearing oral arguments from both the Petitioner and Examiner, and after consideration of the record, the Commission unanimously voted on April 30, 1996, to adopt the Masters' report as to findings of fact and conclusions of law. However, the Commission further voted to reject the Masters' recommendation of a private reprimand, and instead recommended the imposition of a sanction of a public reprimand. (Id. at pp. 45-47).

Thereafter, the Commission certified the record to the S.C. Sup. Ct. (Id. at pp. 19-22). The S.C. Sup. Ct. received briefs and heard oral arguments. On the date of oral arguments, Petitioner served a "Motion to Dismiss or Alternatively to Suspend Further Action". (Id. at pp. 22-26). On September 11, 1996, the S.C. Sup. Ct. issued its Order finding misconduct and imposing a private reprimand. (Id. at pp. 27-28). The S.C. Sup. Ct. held that the retention of fees or honorariums given Petitioner for performing marriage ceremonies is unethical whether or not the collection and retention of such fees are permitted by law. The S.C. Sup. Ct.

directed Petitioner to "henceforth remit any payments received for performance of marriage ceremonies as provided in the County Ordinance." The S.C. Sup. Ct. noted that the Petitioner's failure to comply with this Order "shall result in a more severe sanction than we impose today."

On October 10, 1996, Petitioner sent to the S.C. Sup. Ct. a "notice of appeal" and filed a "request for stay", requesting the S.C. Sup. Ct. to stay its September 11, 1996 Order. (Id. at pp. 29-33). The S.C. Sup. Ct. denied this request and directed that Petitioner file an affidavit that he had complied with the September 11, 1996 order. (Id. at pp. 34-35). Petitioner then filed a "motion for modification" which was denied on November 7, 1996. (Id. at pp. 36-39).

On this same date, the Clerk of the S.C. Sup. Ct. issued a Rule to Show Cause directed to Petitioner why he should not be held in contempt. (Id. at pp. 41-43). The return date for the hearing on the Rule was moved to December 4, 1996. On that date, the Petitioner filed a motion to dismiss the Clerk's Order and Rule to Show Cause. (Id. at pp. 49-64).

On December 18, 1996, the S.C. Sup. Ct. dismissed the Clerk's Rule to Show Cause and issued an order withdrawing the earlier private reprimand and substituting a further Order of discipline. (Appendix A and B to Resp.'s Brief in Opposition). In its December 18th Order, the S.C. Sup. Ct. privately reprimanded Petitioner; ordered Petitioner not to personally retain any further compensation for performing marriages; and specifically directed him to remit to the Jasper County Treasurer, within 15 days of the date of the opinion, all compensation he has received for performing

marriages since September 11, 1996, and any compensation he may receive in the future. The Order further states that Petitioner's failure to comply "may result in a finding of civil or criminal contempt, or the imposition of a more severe form of discipline under Rule 502, SCACR." Id.

Petitioner filed with the S.C. Sup. Ct. a Petition for Rehearing on January 2, 1997 asserting that the December 18th Order violated his equal protection and due process rights under the state and federal constitutions. On January 9, 1997, the S.C. Sup. Ct. issued an Order denying the Petition, finding that it was untimely. The Sup. Ct. also found that even if the motion for rehearing were timely, it was patently frivolous and without merit. (Appendix C to Resp.'s Brief in Opposition).

REASONS FOR DENYING THE WRIT

A. *The Petition Does Not Raise Any Important Issues of Federal Law*

Nothing in these proceedings presents any important question of federal law worthy of certiorari. This Court has always shown particular restraint before intruding into an ongoing disciplinary proceeding by a state court against a member of the state's bar or judiciary. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982). Federal courts have given exceptional deference to the traditional and primary responsibility of state courts for establishing and enforcing standards of conduct for members of their bars and judicial departments. Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3rd Cir. 1977); American Civil Liberties Union v. Bozardt, 539 F.2d 340 (1976); Geiler v. Commission on Judicial Qualifications, 10

Cal.3d 270, 515 P.2d 1 (1973), cert. denied, 417 U.S. 932 (1974); In re Seraphim, 97 Wis.2d 485, 294 N.W.2d 485, cert. denied sub nom. Seraphim v. Wisconsin, 449 U.S. 994 (1980).[3]

The S.C. Sup. Ct. has determined that Petitioner's retention of marriage fees for his own personal use is inconsistent with the proper performance of his judicial duties. As the S.C. Sup. Ct. clearly stated, "personal retention of payment for performing these marriages involves "an exploitation of [Petitioner's] judicial office for his own personal gain." (Appendix B to Resp.'s Brief in Opposition).

But from the outset of these proceedings, Petitioner has not shown any recognition that, as a judge subject to the Code of Judicial Conduct, Petitioner's activities, both judicial and extra-judicial, are subject to scrutiny and regulation where the judge's activities may reflect adversely on the integrity, independence, and impartiality of the judiciary. Even those non-judicial activities which might otherwise be lawful and carried out by the ordinary citizen may rise to the level of misconduct by a judge if such activities present the appearance of misusing the judicial office, erode public

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[3] The Court has granted certiorari in those disciplinary cases where the appellants' activities have come within the "generous zone of protection" reserved for First Amendment associational freedoms and freedom of expression. In re Primus, 436 U.S. 412 (1978); LandMark Communications Inc. v. Virginia, 435 U.S. 829 (1978). This case, however, clearly does not present any issues which fall within the First Amendment penumbra.

confidence, or appear to distract the judge from his judicial duties. Matter of Peagler, 303 S.C. 458, 401 S.E.2d (1991) (probate judge who continued to serve throughout primary and general elections when he was candidate for office of county supervisor warranted public reprimand); In re Welch, 283 Md. 68, 388 A.2d 535 (1978) (judge of the orphan's court who earned income as a part-time auctioneer, and who failed to disclose this auctioneering income on his financial disclosure forms, deserved censure).

This point was specifically addressed by the S.C. Sup. Ct. in the Order denying the Petition for Rehearing:

> The crux of respondent's argument appears to be that it is impermissible for this Court to hold judges to higher standards than non-judges. This position is patently frivolous. By accepting the position of probate judge, respondent has made himself subject to the Code of Judicial Conduct which does establish much higher standards than those applicable to other members of our society. These higher standards are necessary to maintain the integrity and independence of, and the public's trust and confidence in, the judiciary. We find nothing in the state or federal constitution which prohibits this Court from applying more stringent standards to those who have elected to become judges in this State. See, Hayes v. Alabama Court of Judiciary, 437 So.2d 1276 (Ala. 1983)("Judges are not to be measured by standards of ordinary

men and women."); In re Piper, 271 Or. 726, 534 P.2d 159 (1975)(judges are held to greater standards of ethical conduct than even lawyers).

(Appendix C to Resp.'s Brief in Opposition, pp. C-2 - 3)

B. *The Discipline Imposed in this Case Does Not Violate Petitioner's Due Process or Equal Protection Rights*

Petitioner's primary argument is that the federal Due Process and Equal Protection Clauses preclude the S.C. Sup. Ct. from imposing any discipline because Petitioner has a "vested right" in the compensation he receives for performing marriages. But it is a well-settled principle that property interests are not created by the federal constitution. Instead, they are created and their dimensions are defined by existing roles or understandings that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564 (1972).

South Carolina follows the generally recognized principle of law that prospective fees or emoluments of a public office are not the property of the incumbent, and do not fall within the constitutional provision against depriving a person of his property. 63A Am. Jur. 2d Public Officers and Employees § 441 (1984), citing Chicago Patrolmen's Association v. City of Chicago, 56 Ill.2d 503, 309 N.E.2d 3, cert den. 419 U.S. 839 (1974).

In O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945), the S.C. Sup. Ct. considered the constitutionality of a 1939 Act passed by the General Assembly whereby there was a transition for compensation of

certain county officers, previously paid in whole or in part by fees, to salary alone. The Sup. Ct. found that "[p]ublic officers have no contract or property rights in their offices", 35 S.E.2d at 190, and went on to hold that:

> A public employer, here a county, may reduce the compensation of its officers by means of legislation, in the absence of (state) constitutional restraint (there is no provision in the current state constitution which applies to compensation of probate judges); and the fact of such reduction implies and raises no moral obligation to later return the amount of the reduction.

35 S.E.2d at 192.

Petitioner cannot legitimately establish any property interest in marriage fees within the meaning of the Due Process Clause. Likewise, since state law does not vest any property right in public office, or its fees and emoluments, there is no violation of equal protection. The Equal Protection Clause does not create any new or substantive legal rights or enlarge the general classification of rights existing in any state under its laws, nor does it restrain the normal exercise of governmental power. Jones v. Helms, 452 U.S. 412 (1981); 16A Am. Jur. 2d, Constitutional Law, § 739 (1979).

The private reprimand imposed in this case under the Code of Judicial Conduct, coupled with the further direction that Petitioner desist from personally retaining any compensation for performing marriages in the future, were entirely reasonable and

appropriate. There was a full evidentiary hearing conducted before the Hearing Masters. The evidence contained in the record fully supported the findings of misconduct, and the findings of misconduct warranted the imposition of the sanction imposed by the Sup. Ct.

The Code of Judicial Conduct applies equally to all state court judges under the unified judicial system in South Carolina, and certainly applies to all probate judges who comprise the class to which the Petitioner belongs. There is no claim in this case, and no evidence in the record below, that Petitioner has been singled out for arbitrary treatment by the S.C. Sup. Ct.

This proceeding furthered the valid purposes that underlie the Code of Judicial Conduct: to foster respect for the judiciary as a whole; to prevent conflicts of interest; to avoid impropriety and the appearance of impropriety that demeans a judge's high office; and to prevent the exploitation of the judicial office for personal financial gain. Unless the classification warrants some form of heightened scrutiny because it jeopardizes the exercise of fundamental rights or categorizes on the basis of inherently suspect characteristics, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. Nordlinger v. Hahn, 505 U.S. 1 (1992).

C. *Petitioner Cannot Rely Upon a Local Law as Authorization to Engage In Conduct Which Is Prohibited By the Code of Judicial Conduct*

Petitioner attempts to posit that a local law (applicable only in Jasper County) passed by the General Assembly in 1974 authorizes him to accept and retain marriage fees. Although this local law has never been specifically challenged, its constitutionality and continued validity is certainly suspect.

This law was passed after Art. VIII, § 7 of the South Carolina Constitution was ratified and became effective in 1973. Art. VIII, § 7 required the General Assembly to provide for county functions only through general laws, and specifically stated that "[n]o laws for a specific county shall be enacted ...". Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974). (See also S.C. Const. art. V, § 1 governing the unified Judicial Department, which also was ratified and became effective in 1973).

Additionally, when the General Assembly passed the Judicial Reform Act in 1976, Act No. 690, 1976 S.C. Acts 1859, the probate courts were brought under the uniform judicial system. The General Assembly reformed on a state-wide basis the method of compensating probate judges, directing counties to pay probate judges on a salary basis, rather than allowing retention of fees or commissions. This Act specifically provided that fees and commissions collected by the probate judge "shall be the property

of such county".[4] Article V, § 6, Act No. 690, Id. After 1976, the compensation of probate judges, and the disposition of any fees collected by these judges, were controlled by general law, rather than the local law upon which the Petitioner appears to base his argument.

Petitioner cannot properly rely upon any statute or rule to support his claim of entitlement to marriage fees, nor can he

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[4] In furtherance of this uniform system, the General Assembly has further amended these provisions (Act No. 164, Part I, § 2A, 1979 S.C. Acts 311, 316 and Act No. 678, Part IV, § 1, 1988 S.C. Acts 6239, 6259) to now provide for a uniform salary schedule based on county population codified at S.C. Code Ann. § 8-21-760 & 765 (Supp. 1995). These acts repeal by implication any previous act, special or general, that deal with compensation of probate judges. Additionally, under the authority of Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717, local laws passed by the General Assembly prior to 1973 remain in force and effect (if not implicitly repealed by other general law subsequently passed) until the governing body of the county takes further action. As shown in the record, Jasper County Council in December, 1994, enacted an ordinance which directed that all funds generated from fees collected and monies received by Jasper County departments' employees and/or elected officials should be accounted for and timely deposited with the Jasper County Treasurer's Office. (Record below, Exh. 11). The County Administrator then issued a memorandum to all county department heads and elected officials directing that they deposit into the County general fund "all fees, honorariums, fees collected incident to [their] position and collected on county time or property", and holding each official "accountable" for such fees or collections as of the date of the ordinance. Id. This, together with the language contained in S.C. Code Ann. § 8-21-760 (Supp. 1995), represents a clear mandate that the Respondent must account for and pay into the county's general fund any fees or honorariums collected for performing marriage ceremonies.

identify any "mutually explicit understandings" that create any constitutionally protected property interests in these fees. Perry v. Sinderman, 408 U.S. 593 (1972); Kersey v. Shipley, 673 F.2d 730 (4th Cir. 1982); Hamilton v. Board of Trustees of Oconee County School District, 282 S.C. 519, 319 S.E.2d 717, 721 (Ct. App. 1984).

In the final analysis, the separation of powers doctrine found in the S.C. Constitution, S.C. Const., art. I, § 8, is fatal to Petitioner's contention that a local law can authorize a judge to engage in conduct otherwise prohibited under the Code of Judicial Conduct. This is made clear by the S.C. Sup. Ct. in its Order denying the Petition for Rehearing:

> Respondent also continues to argue that by statute he is authorized to retain fees for performing marriages. First, we disagree with respondent's conclusion that Act No. 1148, 1974 Acts 2632, authorizes respondent to personally retain fees for performing marriages. Second, even if we were to accept respondent's strained interpretation of this statute, we adhere to our position that a statute cannot authorize a judge to engage in conduct which is prohibited by the Code of Judicial Conduct. To hold otherwise would be to seriously diminish the inherent authority given to this Court by the South Carolina Constitution to regulate the conduct of judges.

(Appendix C to Resp.'s Brief in Opposition,

pp. C-3 - 4)

D. *Petitioner Has Been Given Ample Notice that his Conduct Violates the Code of Judicial Conduct*

Petitioner also appears to assert that he was sanctioned "without prior notice". This claim has no basis in fact. The S.C. Sup. Ct, in Matter of Johnson, 302 S.C. 532, 397 S.E.2d 522 (1990), made it clear that probate judges could not continue to personally retain fees as compensation. In Johnson, the judge entered into a written agreement with DMH providing for payment of a hearing fee. In this case, Petitioner reaches an oral understanding about the "honorarium" with the couple for whom he performs the marriage.

The probate judge in the Johnson case, just as the Respondent has done in this case, argued that he could keep these fees for his personal use because these funds were not among those specifically enumerated under Article 7 (of the statutory provisions dealing with probate fees) and therefore did not belong to the county. Citing S.C. Code Ann. § 8-21-760 (1986), the Supreme Court completely rejected this argument:

> Respondent claims his failure to remit the DMH funds to the county was not unlawful under this section because the DMH funds are not among the fees and costs specifically enumerated in Article 7. This claim is untenable. It is undeniable that respondent was acting in his capacity as probate judge when holding the DMH hearings. Any fees collected in his capacity as probate judge are

> "probate fees" governed by Article 7 whether specifically enumerated therein or not.

397 S.E.2d at 523 (emphasis added).

The S.C. Sup. Ct. went on to find that the probate judge's failure to deposit these "fees" in the county fund was a violation of "Canons 1 and 2(A) of the Code of Judicial Conduct in failing to observe high standards of conduct and failing to respect and comply with the law." Whatever the practice in Jasper County may have been or the construction afforded the local laws in effect in regard to these fees prior to the Johnson decision in 1990, the Petitioner was clearly on notice thereafter that his retaining marriage ceremony fees\"honorariums", and failing to turn these funds over to the county, constituted actions likely to be construed by the Sup. Ct. as a violation of the Code of Judicial Conduct.

As the record below reflects, in October, 1994, seven months prior to the filing of a formal complaint against Petitioner, the Advisory Committee on Standards of Judicial Conduct (Rule 503, SCACR) issued its Advisory Opinion No. 26-1994 specifically noting the applicability of the Johnson case and stating unequivocally that "[a] (probate) judge who accepts an honorarium for marital services performed is exploiting his judicial position for his own personal gain and thus violating Canon 5(C)(1)" (Record below, Ex. 3). But Petitioner has continued to retain these fees/"honorariums", even after (1) the advisory opinion was issued in October, 1994; (2) the Judicial Standards Commission began directly questioning the Petitioner about the propriety of this conduct through a series of letters from September, 1994

through April, 1995 (Id. at Exh. 6); and (3) the Jasper County Council passed a local ordinance in December, 1994 specifically directing that all fees and "honorariums" collected by Jasper County "elected officials" be deposited with the Jasper County Treasurer. (Id. at Ex. 11).

All of this occurred several months prior to the filing of the Judicial Standards Commission's formal complaint against Petitioner in June, 1995. As the S.C. Supreme Court has already noted, "the procedural due process afforded to respondent, to include the proceedings before the Judicial Standards Commission, the hearings before this Court, and the opportunity to file a motion for rehearing, are more than sufficient under the due process clauses of both the state and federal constitutions." (Appendix C to Resp.'s Brief in Opposition, p. C-3). Any claim that Petitioner did not have adequate "notice" that his conduct violated the Code of Judicial Conduct is frivolous.

E. *The September 11, 1995 Order in the State Proceedings Is Not a "Final Order"*

Petitioner has also asserted that the September 11, 1996 order of the S.C. Sup. Ct. is the "final order" which he is asking this Court to review pursuant to 28 U.S.C. § 1257(a). (Petition for Writ of Certiorari, pp. 1-2, 15). But this is an ongoing disciplinary proceeding, as evidenced by subsequent orders of the Sup. Ct. (Pet. App. at pp. 34-35, 39; App. A, B, and C to Resp. Brief in Opposition). The September 11, 1996 order has now been withdrawn and the December 18, 1996 order substituted in its place. Id.

Additionally, Petitioner has filed various motions with the Sup. Ct. after the September 11, 1996 private reprimand, none of which are provided for under Rule 502, SCACR. Paragraph 25 of Rule 502, SCACR, provides a procedure for the filing of a "motion for rehearing" within 10 days of the filing of the Sup. Ct.'s decision in a judicial discipline proceeding. The purpose for such a motion is to point out to the Sup. Ct. any issues it may have misapprehended or overlooked.

The Petitioner did not file such a motion in this case after the Sup. Ct. issued its September 11, 1996 order. As the Sup. Ct. observed in its December 18, 1996 order, "We note that [Petitioner} did not file a petition for rehearing with this Court raising the issues he is now raising to the United States Supreme Court." (App. A to Resp. Brief in Opposition). Petitioner then filed a "Petition for Rehearing" with the Sup. Ct. dated January 2, 1997, raising the due process and equal protection arguments. However, the Sup. Ct. in its order denying rehearing found the Petition was untimely under Paragraph 25 of Rule 502, SCACR. (Appendix C to Resp.'s Brief in Opposition).

From this perspective, Petitioner did not adequately exhaust his state remedies. Nor is the finality requirement of 28 U.S.C. § 1257(a) satisfied since the Petitioner is asking this Court to engage in a "piecemeal review" of ongoing state disciplinary proceedings and to unnecessarily intrude in state affairs. North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973).

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari in this case is without merit and should be denied.

Respectfully submitted,

CHARLES MOLONY CONDON
Attorney General for the State of South Carolina
NATHAN KAMINSKI, JR.
Counsel of Record
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3680

Columbia, South Carolina

January 13, 1997

APPENDIX A

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown,

Respondent.

ORDER

On December 4, 1996, this Court held a hearing to determine if respondent should be held in contempt for not timely filing the affidavit required by this Court's order of October 24, 1996. Based on the arguments at this hearing, it is apparent that respondent misconstrues the scope of our private reprimand of September 11, 1996.

We, therefore, find it appropriate to withdraw our earlier private reprimand in this matter and to substitute the following order in its place.[1] Finally, the rule to

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[1] Respondent has filed a petition for writ of certiorari with the United States Supreme Court seeking review of the September 11, 1996 private reprimand. We note that respondent did not file a petition for rehearing with this Court raising the issues he is now raising to the United States Supreme Court.

show cause is dismissed.

IT IS SO ORDERED.

_____C.J.
Ernest A. Finney, Jr.

_____A.J.
Jean H. Toal

_____A.J.
James E. Moore

_____A.J.
John H. Waller, Jr.

_____A.J.
E. C. Burnett, III

Columbia, South Carolina
December 18, 1996

APPENDIX B

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown,

Respondent.

ORDER

Respondent is a probate judge. We privately reprimand him for personally retaining compensation for performing marriages.

As a probate judge, respondent issues marriage licenses. S.C. Code Ann. § 20-1-230 (Supp. 1995) and § 14-23-1150 (Supp. 1995). Respondent has been remitting the fee for this license to the county treasurer.

Because he is authorized to administer oaths, respondent has the authority to perform marriages. S.C. Code Ann. § 14-23-300 (1976) and § 20-1-20 (1985). Respondent has been performing marriages during official office hours in the county courthouse, as well as at his home and other

locations after hours. For performing these marriages, respondent has collected a fee or honorarium (hereinafter compensation). The amount of the compensation has been of varying amounts up to $50 per ceremony, and respondent has received several thousand dollars of income a year for performing marriages.

Under Canon 2 of the Code of Judicial Conduct contained in Rule 501, SCACR, a judge must avoid impropriety and the appearance of impropriety. A judge is prohibited from engaging in financial or business dealings which exploit the judge's judicial position, Canon 5(C)()1), and a judge or a member of his family residing in his household may not accept a gift, bequest, favor or loan if the donor is a party or other person whose interests have or are likely to come before the judge. Canon 5(C)(4)(c). Further, a judge may not

receive compensation for quasi- or extra-judicial activities if the source of the payment gives the appearance of impropriety. Canon 6.[2]

In the present case, respondent is performing marriages for persons after they have obtained a license from respondent's office. The personal retention of payment for performing these marriages involves an exploitation of respondent's judicial office for his own financial gain. Even if it is assumed that these payments are gratuitously given as respondent alleged at the hearing

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[2] The misconduct alleged in the complaint occurred before the recent revision of the Code of Judicial Conduct became effective on October 1, 1996. Therefore, this opinion cites to the Code provisions as they existed prior to the revision.

The result reached in this opinion would be no different under the revised Code, since it contains provisions almost identical to those cited in this opinion. See Canon 2, Section 4D(1)(a), Section 4D(5)(h) and Section 4H of the revised Code of Judicial Conduct.

before the hearing masters, the personal retention of these payments is improper since it involves a gift from a person who has appeared before the respondent in his official capacity as a probate judge. Further, it gives rise to a strong appearance of impropriety for a probate judge to personally retain compensation for performing marriages. This is so regardless of whether the marriage takes place at the courthouse during office hours or at some other location after office hours, whether the marriage is performed in any other capacity such as a notary public or whether the marriage involves a marriage license issued in another country.

Respondent asserts that Act No. 1148, 1974 Acts 2632, permits him to accept compensation for performing marriages. Even assuming that this special legislation is

still valid [3] and that respondent's strained construction of this provision is correct, the statutory law of this State cannot authorize a judge to engage in conduct which is prohibited by the Code of Judicial Conduct.

Accordingly, we privately reprimand respondent for his misconduct in this matter. Further, we order respondent not to personally retain any further compensation for performing marriages, and direct him to remit to the county treasurer, within fifteen (15) days of the date of this opinion, all compensation he has received for performing marriages since September 11, 1996, and any compensation he may receive in the future for performing marriages. His failure to do so may result in a finding of

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[3] Examiner has argued that this 1974 Act is unconstitutional under Article III, § 7, of the South Carolina Constitution relating to home rule since it applies only to Jasper County.

civil or criminal contempt, or the imposition of a more severe form of discipline under Rule 502, SCACR.

IT IS SO ORDERED.

_____C.J.
Ernest A. Finney, Jr.

_____A.J.
Jean H. Toal

_____A.J.
James E. Moore

_____A.J.
John H. Waller, Jr.

_____A.J.
E. C. Burnett, III

Columbia, South Carolina
December 18, 1996

APPENDIX C

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown,

Respondent.

ORDER

Respondent asks this Court for a rehearing of its order of December 18, 1996. He asserts the order violates his right to equal protection and due process under both the state and federal constitutions.

Under Paragraph 25 of Rule 502, SCACR, respondent had ten (10) days to file a motion for rehearing. [1] This period expired on December 30, 1996. Respondent did not file a motion for rehearing with this Court until January 2, 1997. Accordingly, the motion for a rehearing is denied as being untimely.

Even if the motion for rehearing were

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[1] Since the expiration of the time to file the motion for rehearing in this matter, Rule 502, SCACR, has been completely revised.

timely, it is without merit. The crux of respondent's argument appears to be that it is impermissible for this Court to hold judges to higher standards than non-judges. This position is patently frivolous. By accepting the position of probate judge, respondent has made himself subject to the Code of Judicial Conduct which does establish much higher standards than those applicable to other members of our society. These higher standards are necessary to maintain the integrity and independence of, and the public's trust and confidence in, the judiciary. We find nothing in the state or federal constitution which prohibits this Court from applying more stringent standards to those who have elected to become judges in this State. See, Hayes v. Alabama Court of Judiciary, 437 So.2d 1276 (Ala. 1983)("Judges are not to be measured by standards of ordinary men and women.");

In re Piper, 271 Or. 726, 534 P.2d 159 (1975)(judges are held to greater standards of ethical conduct than even lawyers). Further, we find that the procedural due process afforded to respondent, to include the proceedings before the Judicial Standards Commission, the hearings before this Court, and the opportunity to file a motion for rehearing, are more than sufficient under the due process clauses of both the state and federal constitutions.

Respondent also continues to argue that by statute he is authorized to retain fees for performing marriages. First, we disagree with respondent's conclusion that Act No. 1148, 1974 Acts 2632, authorizes respondent to personally retain fees for performing marriages. Second, even if we were to accept respondent's strained interpretation of this statute, we adhere to our position that a statute cannot authorize

a judge to engage in conduct which is prohibited by the Code of Judicial Conduct. To hold otherwise would be to seriously diminish the inherent authority given to this Court by the South Carolina Constitution to regulate the conduct of judges.

The motion for rehearing is denied.

IT IS SO ORDERED.

_____ C.J.
Ernest A. Finney, Jr.

_____ A.J.
Jean H. Toal

_____ A.J.
James E. Moore

_____ A.J.
John H. Waller, Jr.

_____ A.J.
E. C. Burnett, III

Columbia, South Carolina
January 9, 1997